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(A) Judge Czamanske temporarily became a judge of the 39th Judicial Circuit only by virtue of the Supreme Court's order assigning him as a judge of that circuit;

(B) the Supreme Court's order transferring Judge Czamanske specifically "confined" his "powers and responsibilities" to "designated matters and cases";

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Alternatively to Point I above, the trial court erred by entering judgment designating Mother's address as the child's mailing address for "educational purposes," because the trial court erroneously applied the law, in that in its judgment the court failed to make the findings required by § 452.375.6 detailing the specific relevant factors that made that arrangement in the best interest of the child.

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§ 452.375, RSMo 2000.

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ARGUMENT

I

The trial court erred by entering the judgment altogether, because Judge Czamanske had no jurisdiction to hear and determine the case, and consequently the judgment is void, in that

(E) Judge Czamanske temporarily became a judge of the 39th Judicial Circuit only by virtue of the Supreme Court's order assigning him as a judge of that circuit;

(F) the Supreme Court's order transferring Judge Czamanske specifically "confined" his "powers and responsibilities" to "designated matters and cases";

(G) the authority to designate such matters and cases rests with the Supreme Court under Mo. Const. art. V, § 6, and Rule 11.01, and otherwise with the presiding judge of the circuit under § 478.240;

(H) neither the Supreme Court nor the presiding judge designated Judge Czamanske to hear and determine this case.

A. *The local rule did not confer jurisdiction on Judge Czamanske because the presiding judge assigned Judge Blankenship to this case.*

Mother argues that Judge Czamanske had jurisdiction because the version of Local Rule 4.2 in effect when this case was tried references § 478.220, which she says is relevant for its statement that circuit and associate circuit judges "may hear and determine all cases and matters within the jurisdiction of their circuit courts."[1] Inferentially, she argues that the rule's reference to the statute gave Judge Czamanske the authority to hear family law cases, including this one, "even though that type of case was not specifically designated" in the rule.[2]

Mother's argument fails because § 478.220 grants the presiding judge overriding authority to assign particular judges to particular cases,[3] which happened here. That section states:

[1]Resp. Sub. Br. at 13.

[2]*Id.*

[3]§ 478.220(3).

> The provisions of this section authorizing the hearing and determination of particular cases or classes of cases by circuit judges and associate circuit judges *shall be subject to the transfer, assignment, and disqualification provisions contained in article V of the constitution, in provisions of law,* or in court rules which are authorized by the constitution or by law.[4]

Article V of the constitution gives the presiding judge "general administrative authority over the court and its divisions,"[5] and concomitantly § 478.240 gives the presiding judge the authority "to assign any judicial . . . personnel anywhere in the circuit" and "to assign judges to hear such cases or classes of cases as the presiding judge may designate."[6] Thus, § 478.220, on which Mother relies, "preserve[s] the traditional procedures related to transfer

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[4] *Id.* (emphasis added).

[5] MO. CONST. art. V, § 15.3.

[6] § 478.240.2.

of cases, assignment by presiding judge, and disqualification."[7]

[7]B.C. Nat'l Banks v. Potts, 30 S.W.3d 220, 223 (Mo. App. 2000).

The presiding judge specifically assigned Judge Blankenship, not Judge Czamanske, to hear this case.[8] As noted earlier, Judge Blankenship was not the presiding judge and thus had no power to assign the case on to Judge Czamanske.[9] So even if the local rule's reference to § 478.220 might have conferred jurisdiction upon Judge Czamanske in the absence of an order assigning this case to another judge, it did not do so here.

B. *Hence this is not an issue of a blanket assignment.*

Mother trumpets *Kansas City v. Rule,*[10] arguing that "the legal issues involved" in it "are directly on point."[11] But *Rule* could not be more irrelevant. *Rule* simply held that assignment of a particular associate circuit judge to a particular case is unnecessary when the presiding judge has, by local rule, assigned to the associate division the

[8]L.F. 5.

[9]App. Sub. Br. at 35-37.

[10]673 S.W.2d 21 (Mo. banc 1984).

[11]Resp. Sub. Br. at 11.

entire *class* of cases to which the particular case belongs.[12] Since there was already a particular assignment to Judge Blankenship in this case, *Rule* is inapposite.

C. *Judge Czamanske was not simply substituting for Judge Blankenship.*

There is no factual support for Mother's argument that this Court assigned Judge Czamanske to *substitute* for Judge Blankenship.[13] The transfer order said nothing of the sort. Nor does anything in the record suggest that Judge Blankenship was even absent the day this case was tried.

[12] *Rule*, 673 S.W.2d at 23-24.

[13] Resp. Sub. Br. at 14, 16.

Mother tries to bolster her claim by saying that the transfer order "would not allow Judge Czamanske to hear cases that would naturally come before judges other than Judge Blankenship in the 39th Circuit."[14] But the order itself does not bear that out. This Court directed that Judge Czamanske be transferred to sit in the "Circuit Court of Stone County," which broadly encompassed the circuit, associate circuit, probate, and municipal divisions. It ordered that Judge Czamanske

> BE TRANSFERRED TO THE FOLLOWING COURT OR DISTRICT:
>
> **39th JUDICIAL CIRCUIT (STONE COUNTY)**
>
> FOR THE PERIOD:
>
> **MONDAY, SEPTEMBER 15, 2003 TO FRIDAY, SEPTEMBER 19, 2003**
>
> **CIRCUIT COURT OF STONE COUNTY**
>
> It is further ordered that the judge hereby transferred shall have the same powers and responsibilities *as a judge of the court* or district *to which transferred*. Such powers and

[14]Resp. Sub. Br. at 14.

> responsibilities shall be confined to designated matters and cases, and shall continue until final disposition of such designated matters including after-trial proceedings.[15]

The breadth of the transfer order—sending Judge Czamanske to Stone County for a week to help out with the case load there—underscores the reason for this Court's instruction that Judge Czamanske's "powers and responsibilities shall be confined to designated matters and cases." Judge Czamanske was supposed to do what the presiding judge, who superintends the circuit, needed him to do.

[15]L.F. 42.

Mother's argument that the limitation of Judge Czamanske's "powers and responsibilities" to "designated matters and cases" was "included merely to prevent Judge Czamanske from hearing any matters that would not naturally come before Judge Blankenship, whom Judge Czamanske was substituing for,"[16] is not faithful to the language of the transfer order itself. Nor could it possibly be faithful to the facts, since there is no evidence that Judge Blankenship was even absent—much less that Judge Czamanske was substituting for him.

D. *Father is not estopped to challenge Judge Czamanske's jurisdiction.*

[16] *Id.* at 16.

Mother's argument that Father is estopped to appeal because the judgment was somehow entered at his request[17] is spurious.

[17] *Id.* at 16-17.

Mother focuses upon the award of joint legal and physical custody of Kaitlyn,[18] which she says both parties asked the court to grant. But she entirely ignores the issue that the parties agreed was contested: Kaitlyn's residence.[19] Before Kaitlyn is school age, exchanging custody every three weeks is workable. But it will not be once she goes to school. Hence both Father[20] and Mother[21] want Kaitlyn to reside with them and attend school where they live. Father testified that he believed it to be in Kaitlyn's best interest to attend school in Missouri.[22] Mother thought it in Kaitlyn's best interest to be placed with her for school purposes.[23] She said that if she were

[18]L.F. 46-47.

[19]Tr. 2.

[20]Tr. 21.

[21]Tr. 45.

[22]Tr. 21.

[23]Tr. 59.

"named the parent as far as residence and school," she intended "to relocate Kaitlyn to Colorado to go to school."[24] Father did not intend to relocate her residence.[25]

Mother does not—indeed cannot—explain how this was a settled issue. It was the whole reason for the trial. Thus the case that Mother cites, ***Cheffey v. Cheffey,***[26] has no relevance here. Furthermore, it is settled that subject matter jurisdiction cannot be conferred by agreement,

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[24]Tr. 57.

[25]Tr. 22.

[26]821 S.W.2d 124 (Mo. App. 1991).

estoppel, or waiver,[27] so Father could raise Judge Czamanske's lack of jurisdiction on appeal in any event.[28]

[27]State Tax Comm'n v. Administrative Hearing Comm'n, 641 S.W.2d 69, 72 (Mo. banc 1982) (plurality).

[28]*Id.*

II

Alternatively to Point I above, the trial court erred by entering judgment designating Mother's address as the child's mailing address for "educational purposes," because the trial court erroneously applied the law, in that in its judgment the court failed to make the findings required by § 452.375.6 detailing the specific relevant factors that made that arrangement in the best interest of the child.

A. *"Custodial arrangement" does not mean "custody."*

Section 452.375.6 requires that the court include written findings in the judgment if the parties have not agreed to a "custodial arrangement."[29] Mother essentially argues that "custodial arrangement" means "custody."[30] She

[29] § 452.375.6. The version of this statute in effect at the time of trial was RSMo 2000. The statute was amended in 2004, after the trial in this case in 2003. The amendments did not affect the portions of the statute at issue here.

[30] *See* Resp. Sub. Br. at 23 (arguing that the court's action "does not constitute a rejection of a *custodial arrangement*, because '*custody*' is defined as joint legal, sole legal, joint physical, sole physical, or any combination thereof") (emphasis added).

urges that the legislature "went to great lengths to explain and delineate 'custody'" and that the "custodial arrangement is the legal relationship of the parent to the child."[31] But the overall "arrangement" is broader than the "custody" itself.

The statute defines "custody" to mean "joint legal custody, sole legal custody, joint physical custody or sole physical custody or any combination thereof."[32] "Joint legal custody" and "joint physical custody" are further defined.[33] But even in the more specific definitions of those terms, there is no reference to the particular details of a custody arrangement. "Custody" is simply the possessory

[31] *Id.* at 19.

[32] § 452.375.1(1).

[33] § 452.375.1(2)-(3).

and/or decision-making rights of the parents.

The statute separates the broader "custody arrangement" from the narrower concept of "custody." It states that the court "shall determine *custody* in the best interests of the child"[34] and "shall not award *custody*" to a parent under certain circumstances.[35] But it ties the "custody arrangement" to the state's public policies of promoting contact of the child with both parents and encouraging parents to participate in decisions affecting the health, education, and welfare of the child.[36] It thus directs the court to "determine the *custody arrangement* which will best assure both parents participate in such decisions and have frequent, continuing and meaningful contact" with the child.[37] And it mandates that the court consider various types of *custody* "[p]rior to awarding the appropriate

[34] § 452.375.2 (emphasis added).

[35] § 452.375.3 (emphasis added).

[36] § 452.375.4.

[37] *Id.* (emphasis added).

custody arrangement."[38]

So § 452.375 itself refutes Mother's claim. The "custody arrangement" encompasses more than "custody," whether sole or joint. The parties may, as here, agree on joint legal and joint physical custody of Kaitlyn. But they may also, as here, disagree on how things work in practice. Every day, in hundreds of domestic cases throughout Missouri, parents argue over the details of custody arrangements—the nature and extent of periods of temporary custody or visitation, who transports the child and to where, who bears the cost of transportation, and other issues.

[38] § 452.375.5.

It is the latter that § 452.375.6 addresses. If the parties "have not agreed to a *custodial arrangement,*" or if the court "determines such *arrangement* is not in the best interest of the child," it must make written findings "detailing the specific relevant factors that made a particular *arrangement* in the best interest of the child."[39] The court must also make written findings detailing the specific relevant factors that cause it to reject "a proposed *custodial arrangement.*"[40]

[39] § 452.375.6 (emphasis added).

[40] *Id.* (emphasis added).

In her attempt to distinguish ***Sleater v. Sleater,***[41] Mother simply emphasizes the distinction between "custody" and a "custodial arrangement." She acknowledges that the parties in ***Sleater*** "asked the court to incorporate into the dissolution decree their pre-dissolution custodial agreement, which stipulated to joint legal and physical custody."[42] ***Sleater*** states that the court "did award joint legal and physical custody to husband and wife."[43] So if "custody" means "custodial arrangement," as Mother argues here, written findings were unnecessary. But ***Sleater*** held just the opposite.[44] As Mother acknowledges, in ***Sleater*** "the judge rejected the joint custodial ***arrangement*** proposed by both parties"[45] by changing the time periods in which the

[41]42 S.W.3d 821 (Mo. App. 2001).

[42]Resp. Sub. Br. at 21.

[43]*Sleater*, 42 S.W.3d at 823.

[44]*Id.* at 823-24.

[45]Resp. Sub. Br. at 21 (emphasis added).

parents would each have the parties' youngest child.[46] In *Sleater,* therefore, the court did not equate—and could not have equated—the type of custody with the details of the custodial arrangement.

In this case, the parties agreed on the type of custody, but they disagreed on the custodial arrangement. In particular, as they told the court at the outset of the hearing, the only contested issue was "the residence for the minor child."[47] Under Mother's theory, as long as the trial court heeded the parties' suggestions as to the type of custody, the court is entirely unaccountable for its decision on the details of the overall arrangement—here, the reason why it thought mother's residence in Colorado better than father's residence in Missouri for purposes of the Kaitlyn's education.

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[46]*Sleater,* 42 S.W.3d at 823.

[47]Tr. 2.

It entirely frustrates the legislative purpose of making trial courts accountable for their actions if, as the Southern District held and as Mother urges, a court need not explain in the judgment why it ruled as it did. Trial courts are free to do whatever they want to do if they can leave the parties and the appellate courts to guess about the basis for their decisions. The legislature did not intend that.

B. *The docket entry is not an "order" within the meaning of § 452.375.6.*

The legislature intended for the court's final decision to embody the written findings that the legislature demands. The word "judgment" is a term of art, which the legislature presumably knew the courts understand to include "a decree and any order from which an appeal lies."[48] In this context, courts and lawyers have long used the terms "decree of dissolution of marriage" and "order of modification" to describe final decisions in cases of divorce and child custody, visitation, and support

[48]Rule 74.01(a).

modification, respectively. It thus strains the language beyond its common sense meaning to suggest that any other type of "order" that the court does not intend to serve as the judgment satisfies the requirement for written findings. That is precisely what the court said in *Morse v. Morse.*[49] There the court purported to make findings in a separate document entitled "judgment memo,"[50] which used the magic word "judgment" that Rule 74.01(a) requires. Yet the court found that insufficient. Even if the "judgment memo" had been included in the record on appeal, it said, "any findings made in the document regarding the relevant factors under section 452.375.2 would not be sufficient to satisfy the requirement of section 452.375.6. Under subsection 6, such written findings must be included in the judgment itself."[51] In other words, the findings must appear in the court's final decision.

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[49]80 S.W.3d 898 (Mo. App. 2002).

[50]*Id.* at 904 n.1.

[51]*Id.*

C. *The facts are not deemed found in accordance with the result reached.*

Finally, Mother argues that when a trial court does not make explicit factual findings, the facts are deemed found implicitly in accordance with the result reached, so that there is no error here.[52] That is the general rule,[53] but it does not apply when a statute mandates factual findings. Interestingly, the case that Mother cites, *Mund v. Mund,*[54] explicitly says that.[55]

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[52]Resp. Sub. Br. at 24.

[53]Rule 73.01(c).

[54]7 S.W.3d 401 (Mo. banc 1999).

[55]*Id.* at 403-04.

CONCLUSION

Judge Czamanske had no jurisdiction to hear and determine this case. Father is not estopped from asserting his lack of jurisdiction.

Furthermore, the judgment does not make the required findings. Section 452.375.6 is not as narrow as Mother reads it. "Custody" does not mean "custodial arrangement."

The judgment must be vacated or reversed.

Respectfully submitted,

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By _____

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

I certify the following:

1. The foregoing Brief complies with the type and volume limitation of Rule 84.06. The typefaces are Century 725 BT and Arial.

2. The signature block of the foregoing Brief contains the information required by Rule 55.03(a). To the extent that Rule 84.06(c)(1) may require inclusion of the representations appearing in Rule 55.03(b), those representations are incorporated herein by reference.

3. The foregoing Brief, excluding the cover, certificate of service, this certificate, and the signature block, contains 3,181 words as counted by Word Perfect 9.

4. Microsoft Word format is unavailable to the undersigned for preparation of this Brief. This Brief has been prepared using Word Perfect 9 for Windows.

5. The disk submitted herewith as required by Rule 84.06(g) has been scanned for viruses and is virus free.

Richard L. Schnake, # 30607

CERTIFICATE OF SERVICE

I certify that I served one copy of this Appellant's Reply Brief in the form specified by Rule 84.06 and one copy of the disk required by Rule 84.06(g) on Mr. Douglas C. Fredrick, counsel for Respondent, by mailing them to him at his address of record, on June 2, 2005.

Richard L. Schnake, # 30607

APPENDIX

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